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ABSTRACT

Decisions made by federal and state courts during 1983 concerning higher education are reported in this chapter. Issues of employment and the treatment of students underlay the bulk of the litigation. Specific topics addressed in these and other cases included federal authority to enforce regulations against age discrimination and to revoke an institution's tax-exempt status; the application of laws against discrimination in employment; actions affecting the status or pay of nontenured and tenured faculty members; collective bargaining rights of the faculty; the termination of administrators and other personnel; discrimination in student admissions; the assessment of nonresident tuition; student financial aid; students' first amendment rights; the dismissal of students for disciplinary and academic reasons; the provision of transportation to disabled students; the application of athletic association regulations; liability claims involving personal injury, workers' compensation and contract liability; and the right of the National Collegiate Athletic Association to control the telecasting of football games. (PGD)

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HIGHER EDUCATION

Robert M. Hendrickson with Dennis E. Gregory*

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8.0 INTRODUCTION

Nineteen eighty-three saw a variety of cases heard in the court system. The Supreme Court was again active, hearing one case involving the authority of the federal government to regulate state employees and another concerning the authority of the Internal Revenue Service (IRS) to withhold tax-exempt status from a religious college found to be involved in racial discrimination. However, as the year closed, the higher education community was waiting for a decision on the Title IX case involving Grove City College.

The year also saw cases involving the use of multiple regression in sex discrimination and equal pay, along with the question of academic freedom in the release of tenure committee information in Title VII cases. Title VII also saw an interesting decision in a classified personnel case. Litigation concerning employment issues was heavy. Student issues of significant interest revolved around questions of nonresident tuition, commercial speech, funding of student newspapers, academic dismissal and personal injury. National Collegiate Athletic Association (NCAA) regulations of televised football games continued to advance through the courts toward what might be a Supreme Court ruling.

8.1 INTERGOVERNMENTAL RELATIONS

Several issues arose concerning federal authority versus state authority. For example, while the Constitution reserves education as a state prerogative, it does not preclude federal regulations under certain circumstances. A case on state and federal powers with significance for

higher education tenure policy was before the Supreme Court.[1] This case challenged congressional authority to regulate state employees under the Age Discrimination in Employment Act of 1978 (ADEA).[2] As reported in the *Yearbook 1983*, the district court, citing *The National League of Cities v. Usery*,[3] found that the federal government's regulations under the commerce clause must look larger as a national interest when balanced against the defendant state's nominal interest in discrimination on the basis of age.[4] The district court's decision was that ADEA did not apply to state game wardens because of the state's defined powers under the tenth amendment.

The Supreme Court, on appeal, reversed the lower court decision. Justice Brennan, while citing the importance of the *National Cities* case, noted that the Court's ruling in *Hodel v. Virginia Mining and Reclamation Association*[5] was controlling. The Court applied the three-part test of *Hodel* to determine whether states should be immune under the tenth amendment from "an otherwise legitimate exercise of federal powers to regulate commerce,"[6] in this case through ADEA. The three-part test asked the following questions: first, does the statute regulate the state as a state; second, does the statute address matters indisputably attributes of state sovereignty; and third, does the state compliance with the statute directly impair the state's ability to structure integral operations in areas of traditional state governmental functions? The Court found that the physical preparedness of game wardens, a state governmental interest, is not impaired by ADEA. The Court reasoned that ADEA allows the state to use age as a criteria for game warden retirement if it can show that age is a "bona fide occupational qualification" for the job. In reaching this decision, the door was left open to the question of how the three-part *Hodel* test might be applied to other state employees. Applying ADEA to tenured faculty, for example, may affect the financial integrity of the institution and the state's ability to redirect educational programs, thus yielding an interesting question for future litigation.

In another case the Supreme Court addressed the relationship between the federal government and private institutions.[7] At issue

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1. EEOC v. Wyoming, 103 S. Ct. 1054 (1983).
2. 29 U.S.C. § 621 (1978).
3. 426 U.S. 833 (1975).
4. *See* THE YEARBOOK OF SCHOOL LAW 1983 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1983] at 293; EEOC v. Wyoming, 514 F. Supp. 595 (D. Wyo. 1981).
5. 452 U.S. 264 (1981).
6. *Id.* at 287.
7. Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983). *See* THE YEARBOOK OF SCHOOL LAW 1982 (P. Piele, ed.) [hereinafter cited as YEARBOOK 1982] at 253-54.

specifically was the question of whether the IRS had the legislative and constitutional authority to deny tax-exempt status to Bob Jones University and Goldsboro Christian School. The IRS denied tax-exempt status to Bob Jones University, a fundamentalist-oriented college, because it sponsored racially discriminatory policies through its regulation of student life and admissions policies. Bob Jones University challenged IRS authority within the Internal Revenue Code as established by Congress. Further, Bob Jones University alleged that even if the IRS had congressional authority, the free exercise and establishment clauses prohibited the IRS from enforcing these regulations when institutional policies were resulting from religious beliefs. Chief Justice Burger, writing the opinion, established that Congress intended that the IRS grant tax-exempt status only to those organizations that "serve a public purpose and not be contrary to established public policy."[8] Further, he noted that it has been long established that the free exercise and establishment clauses are not absolute prohibitions, especially where religious practices violate accepted public policy.[9] The governmental interest at stake was compelling. The eradication of racial discrimination is a public policy that superseded religious beliefs. Thus, the IRS may deny tax-exempt status to private religious schools that discriminate on the basis of race.

8.2 EMPLOYEES

The job market and financial conditions continue to be reflected in the voluminous number of cases in this area. The employee cases have been organized under several broad topics: alleging discrimination under federal regulations (Title VI and VII of the Civil Rights Act, Title IX of the Education Amendments, the Equal Pay Act, Age Discrimination, and P.L. 94-142) and in hiring; complaints involving nontenured faculty; complaints from tenured faculty; and collective bargaining cases. This edition of the *Yearbook* adds a new section for cases involving administrators and classified personnel.

8.2a Discrimination in Employment

8.2a(1) Title VI

Students, faculty, alumni, and prospective students filed a class action suit alleging violations of Title VI of the Civil Rights Act of 1964.[10]

8. *Id.* at 2026.
9. *Id.* at 2034.
10. 42 U.S.C. § 2000(d) (1964).

The plaintiffs asked for declaratory and injunctive relief against the United States Department of Education (DOE), the Pennsylvania Board of State College and University Directors, and the President and Board of Trustees of Cheyney State College, a predominantly black institution. Pennsylvania was found by HEW to be one of ten states not in compliance with Title VI in 1969. In 1973 in *Adams v. Richardson*,[11] Pennsylvania was one of several states ordered to develop desegregation plans. In 1981 DOE notified Pennsylvania that its desegregation plan was inadequate and ordered the state to submit a new proposal. The Third Circuit upheld the district court's order "staying proceedings" in this suit since administrative action was still pending through the United States Office of Education.[12] The circuit court acknowledged that the district court could have ordered a writ of mandamus in this case but did not err in issuing a stay since administrative action was pending. The circuit court also ruled that the stay was not appealable since the stay was not final and the lower court had ordered the defendants to report in ninety days on the administrative procedures negotiated between DOE and the state of Pennsylvania.

8.2a(2) Title VII

Title VII of the Civil Rights Act of 1964[13] was the basis of a number of cases involving charges of discrimination against females in employment. However, several cases alleged reverse discrimination in employment. This section will lead off with controversies concerning academic freedom in tenure decisions and the use of multiple regression in Title VII cases.

A significant Title VII case in 1983 involved the release of information on tenure decisions to the Equal Employment Opportunities Commission (EEOC). This case is in contrast to a case reported in the *Yearbook 1982*.[14] In the *Dinnan* case the court opened up the deliberations of tenure committees to full disclosure where questions of discrimination had been raised. The *Yearbook 1983* contained a case that stated that absent reasons for not granting tenure, the deliberations of the tenure process must be opened to investigation.[15] This year's case involved the University of Notre Dame where the court took a more guarded and protective approach to the concepts of academic freedom and institutional prerogatives in granting tenure to faculty.[16]

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11. 356 F. Supp. 92 (D.D.C. 1973), *aff'd as modified*, 480 F.2d 1159 (D.C. Cir. 1973).
12. Cheyney State College Faculty v. Hufstedler, 703 F.2d 732 (3d Cir. 1983).
13. 42 U.S.C. § 2000(e) (1964).
14. *See* YEARBOOK 1982 at 264; *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981).
15. *See* YEARBOOK 1983 at 305; Gray v. Board of Higher Educ. CUNY, 692 F.2d 901 (2d Cir. 1982).
16. EEOC v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983).

The *Notre Dame* case involved a black economics professor who was denied tenure and filed a complaint with EEOC alleging discrimination. EEOC demanded that the university provide the personnel files of the plaintiff and all other employees, past and present, of the economics department. The university refused to supply the information unless names and other identifiable information were removed from these sensitive and confidential files. They also asked EEOC to guarantee the confidentiality of these files by signing a nondisclosure agreement. This impasse resulted in action before the district court. The district court ordered the university to make the complete personnel records without redactions available to EEOC.[17] Further, they reduced the scope of the EEOC request by stipulating that only those personnel files of former and current economics department faculty whose tenure status was reviewed during the period of the plaintiff's eligibility for tenure be provided. They also negated the university's request for a nondisclosure agreement.

The circuit court, citing the need to balance the institution's prerogatives to select faculty and EEOC's right to pursue a charge of discrimination, set some narrow standards subject to court supervision under which EEOC could procure the desired information. Citing the need to protect academic freedom and the concepts of peer review, the court ordered the university to provide the personnel files of the faculty outlined under the district court's provision, after the university had redacted any information such as name, address, institutional affiliation, and "other identifying features (e.g., publications, professional honors)" that would identify the evaluating scholars found in the files. Any challenge by EEOC to the redacted information would be reviewed by the court. Further the release of information would be particularized because of the sensitive nature of the peer review process in academic institutions. The court used the term "particularized need" to describe the need to limit the released information to those facts directly related to a specific issue outlined by EEOC. This analysis must be done each and every time EEOC sought additional privileged information. Further, the circuit court ordered the district court to issue a protective order assuring that the information given to EEOC would be released only to persons directly involved in this action.

Several cases used statistical evidence (multiple regression) to prove discrimination, but had differing results. In a New York Title VII case the question of statistical evidence proved to be significant in a ruling favorable to the plaintiffs.[18] A class action suit by females charged that

17. EEOC v. University of Notre Dame Du Lac, 551 F. Supp. 737 (N.D. Ind. 1982).
18. Melani v. Board of Higher Educ. of City of New York, 561 F. Supp. 769 (S.D.N.Y. 1983).

City University of New York (CUNY) had discriminated against women in awarding salaries. The plaintiffs used multiple regression analysis, which allowed the analysis of a number of factors (independent variables) on a particular dependent variable. Citing the Supreme Court, the district court held that multiple regression was sufficient to establish a prima facie case. Defendants unsuccessfully argued that the statistics alone should not establish a prima facie case. They presented a number of criticisms of the plaintiffs' multiple regression analysis. First, they criticized plaintiffs' study for not distinguishing among different nonfaculty titles. The court held that this problem was "not pervasive" and that the flaw did not detract from the findings. Second, defendants' criticism was that the multiple regression analysis did not include a measure of faculty academic productivity (such as publications, research, and service) prior to and during employment at CUNY. The court held that, since measures of faculty productivity, "may incorporate the effects of discriminatory decisions" rather than actually measuring productivity, plaintiffs should not be required to include such analysis.[19] Further the court found that the study included preemployment academic productivity by including three variables, "age, degrees and years between degrees."[20] The final criticism was that the study failed to account for market conditions characteristic of different departments. The district court ruled that this omission did not negate the value of the study. Since the defendants were unable to show inaccuracy and insignificance of the plaintiffs' multiple regression analysis and failed to provide other reasons for the discrimination, they failed in their burden of proof. Therefore, the court found in favor of the plaintiffs. However, this ruling is different from the ruling on multiple regression by this same court several months later in *Sobel*, which will be discussed under the Equal Pay Act.[21]

Another case involving statistical analysis was a class action suit by former and current female employees and applicants for employment at the University of Rhode Island.[22] The women alleged that the university had discriminated on the basis of sex in recruiting, hiring, compensation, tenure, promotion, termination, and contract nonrenewal. The defendant institution asked the district court to grant summary judgment since a statistical analysis using multiple regression found no statistical basis for a finding of discrimination. The plaintiffs countered with a critique of the university's study. The district court,

19. *Id.* at 778.
20. *Id.*
21. Sobel v. Yeshiva Univ., 566 F. Supp. 1166 (S.D.N.Y. 1983).
22. Peng-Fei Chang v. University of Rhode Island, 554 F. Supp. 1203 (D.R.I. 1983).

noting that a summary judgment should be awarded only if the defendant can show no genuine issue exists in material facts, denied the summary judgment. They found that the plaintiffs had "made it abundantly clear" that issues of fact were genuine.[23] Further, the court found it would be remiss, even absent the plaintiffs' critique of defendant's statistical study, if it did not subject the statistical evidence to indepth analysis at trial. The court stated that statistical evidence, although important in discrimination cases, was "neither irrefutable nor necessarily definitive."[24]

The final multiple regression case used statistical evidence to allege that the employer's reasons for not employing the female were a mere pretext for discrimination.[25] A female employee of a state research foundation was removed from a research analyst's position to a previously held position because of cutbacks in the foundation's budget. She was later bypassed for other research analyst positions. The district court applied the "disparate treatment" theory and found no basis to substantiate the claim of discrimination in employment based on sex. The circuit court of appeals, noting that under civil procedures a "finding of fact may not be set aside unless clearly erroneous,"[26] affirmed the district court decision. The plaintiff established a prima facie case of potential discrimination. The employer provided a rationale within the prerogatives of management, which on their face were free of discrimination. The Second Circuit found that statistics on previous hiring practices alone would not support the allegation that the employer's reasons for not hiring the plaintiff were a mere pretext to discriminate on the basis of sex.

A case that could have far reaching implications for colleges and universities involved classified employees.[27] A class action suit was brought by black and female hourly employees but was later expanded to include clerical employees. The district court found that several employee practices had a "disparate impact" on blacks and women. First, certain job qualifications were found not to be related to the specific job. For example, the requirement of a high school diploma was established because the persons holding the jobs in 1972, the year the requirements were established, had degrees, but the defendants could not show the job relatedness of those requirements in some positions. Second, the classified pay plan for hourly employees created

23. *Id.* at 1205.
24. *Id.* at 1206.
25. Sweeney v. Research Found. of State Univ. of New York, 711 F.2d 1179 (2d Cir. 1983).
26. FED. R. CIV. P. 52(a).
27. Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608 (5th Cir. 1983).

wage differences between the lower paid blacks and women and white employees. The university was unable to justify these discrepancies. Third, the implementation of subjective job qualifications for promotion and hiring had effectively channeled blacks and women into low-skilled manual labor and clerical hourly positions, whereas whites filled salaried office work or skilled craft positions. The Fifth Circuit Court affirmed the findings of the district court but remanded the case for a determination of intent to discriminate. The court ruled that Title VII liability under the "disparate treatment" theory required proof of intent to discriminate prior to awarding damages. The case could provide significant guidance in establishing equitable policies for classified and clerical personnel and should be reviewed carefully.

One case illuminates the differences between "disparate impact" and "disparate treatment" claims.[28] An unsuccessful black candidate for a position at the State Board of Higher Education in Oregon filed a Title VII claim. The district court granted a summary judgment to the defendant based on the plaintiff's inability to show a lack of discriminatory intent. On appeal, the Ninth Circuit reversed and remanded the case with instructions that the plaintiff's Title VII claim be reviewed in light of both the "disparate impact" theory and the "disparate treatment" theory.[29]

The District Court of Oregon (*supra* note 28) reviewed the case and found that the plaintiff failed to establish a prima facie case under the "disparate impact" theory and failed to show that the defendant's reasons for not employing him were a mere pretext under the "disparate treatment" theory. Under "disparate impact" theory a prima facie case is established by the plaintiff showing that "facially neutral employment practices have a significant discriminatory impact on a group protected by Title VII." Specifically, the plaintiff charged that the criterion of good written and oral communication had a substantial discriminatory effect on black applicants. Plaintiff's arguments, relying solely on the fact that he was not hired, were insufficient to support a prima facie case of "disparate impact." Under the "disparate treatment" theory a prima facie case is established by showing that the plaintiff (1) is a member of a Title VII protected group, (2) was qualified for the position sought, and (3) was not hired. The establishment of a prima facie case results in the burden shifting to the defendant. The defendant's reasons—the plaintiff was less qualified than others and lacked oral and written skills—were considered appropriate. The plaintiff failed in his burden to show that the

28. Peters v. Lieuallen, 568 F. Supp. 261 (D. Or. 1983).
29. Peters v. Lieuallen, 693 F.2d 966 (9th Cir. 1982).

reasons were either inaccurate or were a mere pretext for discrimination. While the judge noted that he may disagree with some of the judgments made by the selection committee, they were within the employer's prerogatives in selecting candidates and were free of Title VII violations.

In another Title VII case, a white female filed a Title VII claim of employee discrimination in her removal from a predominantly black institution.[30] At trial the District Court of the Southern District of Georgia found that the plaintiff could not file a claim against individual officials under Title VII, but rather against the board of regents, the true employer. The Eleventh Circuit Court of Appeals upheld the decision of the district court. The plaintiff had established a prima facie case under Title VII. The institution's reasons for dismissal—incompetence and lack of student rapport—were a pretext for discrimination. The charges were found to be motivated by other faculty actions that were racially motivated. The facts indicated that the institution's president, on investigation of the charges, found them to be baseless. The plaintiff was able to prove that the charges were solely motivated by race and that race was a significant factor in the origin of the charges and the final decision to dismiss.

Another Title VII case involved a staff person who was responsible for investigating charges of discrimination at the institution and reporting to the administrative vice-president options for their resolution.[31] However, the dismissed female had repeatedly superseded the responsibilities of this position and attempted to become an advocate for the employees and had released information to the press. The circuit court found that such actions were not protected by the first amendment, since they were outside the scope of plaintiff's job and stifled established procedures of the institution for resolution of claims. This evidence of insubordination and exceeding the responsibilities of her position was an adequate reason to defeat a Title VII claim. Further, the plaintiff failed to establish employee discrimination based on her removal to a new job and the upgrading of a position she formerly held. Under this claim she failed to establish a prima facie case based on retaliation for her Title VII suit.

In several cases the plaintiffs either failed in their burden of proving discrimination[32] or failed to prove that the institution's reasons were a

30. Lincoln v. Board of Regents of Univ. Sys. of Georgia, 697 F.2d 928 (11th Cir. 1983).

31. Hamm v. Board of Regents of State of Florida, 708 F.2d 647 (11th Cir. 1983).

32. *See* Black v. Brown Univ., 555 F. Supp. 880 (D.R.I. 1983); Kureshy v. CUNY, 561 F. Supp. 1098 (E.D.N.Y. 1983).

mere pretext for discrimination.[33] In another case involving reverse discrimination, the Eighth Circuit Court[34] affirmed a district court decision[35] that found the plaintiff to have been discriminated against in hiring in violation of Title VII and the Age Discrimination in Employment Act. However, the Eighth Circuit reversed the portion of the decision dealing with back pay, saying that the district court had failed to calculate back pay on a year-by-year basis. Finally, in a New Jersey case, the federal district court found that the charges brought under Title VII and New Jersey discrimination laws were frivolous.[36] The court ordered the plaintiff to pay the defendant university for attorney's fees and costs totalling $24,875.52.

8.2a(3) Title IX

While the *Grove City College v. Bell*[37] case was argued before the Supreme Court, a similar Title IX case, *Hillsdale College v. Department of HEW*, reached the Supreme Court Docket on appeal from the circuit court.[38] Hillsdale College refused to execute the Assurance of Compliance form required by HEW under Title IX regulations. HEW alleged that this private nonsectarian, coeducational college was required to conform to Title IX regulations since students received either National Direct Student Loans (NDSL), Basic Educational Opportunity Grants (BEOG), Supplementary Educational Opportunity Grants (SEOG) or Guaranteed Student Loans (GSL). An Administrative Law Judge (ALJ) ruled that receipt of funds under these programs by students at the institution made the institution a "recipient" of "federal financial assistance" under Title IX. Therefore the institution is a "program" within the meaning of Title IX.

On appeal, the Sixth Circuit, after reviewing the legislative history and citing *North Haven v. Bell*,[39] affirmed in part and reversed in part the ALJ decision. They held that BEOGs, NDSLs, SEOGs and GSLs given to students constituted "federal financial assistance," and therefore that Hillsdale College was a "recipient" under Title IX. Citing *North Haven*'s "program specific" ruling, they found that federal student financial aid does not make the institution a program

33. McMillan v. Rust College, 710 F.2d 1112 (5th Cir. 1983).
34. Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983).
35. *See* YEARBOOK 1983 at 299, Leftwich v. Harris-Stowe State College, 540 F. Supp. 37 (E.D. Mo. 1982).
36. Brown v. Fairleigh Dickinson Univ., 560 F. Supp. 391 (D.N.J. 1983).
37. *See* YEARBOOK 1983 at 295, Grove City College v. Bell, 687 F.2d 684 (3d Cir. 1982), *argued* 52 U.S.L.W. 3433 (U.S. Dec. 6, 1983).
38. 696 F.2d 418 (6th Cir. 1982); Supreme Court Docket No. 82-1538.
See YEARBOOK 1983 at 294, North Haven Bd. of Educ. v. Bell, 102 U.S. 1912 (1982).

within Title IX, but that only the student grants and loan program (the financial aid office) comes under the authority of Title IX. Further, the court held that absent a charge of discrimination, HEW could cut off funds for failure to complete an assurance of compliance form. However, the assurance of compliance would apply only to the regulated program, and, therefore, the requirements as applied to the total institution were invalid.

While the circuit court in *Grove City College* (*supra* note 37) found that the institution was a program because of the receipt by students of federal student financial aid, *Hillsdale College* took a more limited view. Both cases are before the Supreme Court and either of these cases could point the direction the Court will take as it releases its decision in 1984.

8.2a(4) The Equal Pay Act

The Equal Pay Act (EPA) (*supra* note 21) regulates discrimination on the basis of sex in the award of salaries and other employee benefits. As was discussed under Title VII, multiple regression as evidence is also at issue in EPA cases. This year the Southern District Court of New York found multiple regression analysis sufficient to reach a finding of discrimination under Title VII despite deficiencies raised by the defendants.[40] Since similar standards and methods of analysis are used in Title VII and EPA cases, it is interesting to note that the same court ruled differently in another multiple regression case three months later.[41] In a case involving doctors in the Medical School at Yeshiva University, using the same arguments employed by the defense in the earlier case, Yeshiva University persuaded the court that multiple regression did not establish a prima facie case for sex discrimination in pay. The defense cited several deficiencies in the regression analysis. They noted that the multiple regression analysis used by the plaintiffs did not take into account faculty productivity, differentials in starting salaries based on productivity, and market value factors of different positions. The key difference between this case and the earlier case appears to be that the defense conducted its own multiple regression analysis using these factors and presented them to the court. The defense also was able to effectively show that their promotion and tenure criteria that were used to determine rank, the main measure of productivity in their regression analysis, was "not contaminated by elements of sex discrimination."[42]

40. Sobel, *supra* note 21.
41. Melani, *supra* note 18.
42. Sobel, *supra* note 21, at 1180.

The most novel Equal Pay Act case this year involved the question of whether the Equal Pay Act can be applied to a church-controlled college. In this case, the district court, while ruling that the plaintiff did not support a claim of discrimination under EPA, found that the Fair Labor Standards Act (FLSA) and EPA applied to church-affiliated colleges.[43] The court acknowledged the Supreme Court ruling in *NLRB v. Catholic Bishops of Chicago*, in which the Court found that the National Labor Relations Act (NLRA) did not apply to lay teachers in church-operated schools.[44] However, the district court found a number of exceptions in reaching a contrary ruling concerning FLSA as amended by EPA. The first exception was that the decades of judicial interpretations of FLSA, not NLRA, govern here. However, in review of judicial precedent, the Court failed to cite cases that apply FLSA to church-related institutions. The second exception cited was that this court cannot construe EPA to exclude employees of the college. The college was an "employer" within the meaning of the statutes. The third exception was that Belmont College was a college that provided a strong religious environment for learning as opposed to the schools in *Catholic Bishops* that "provide a religious atmosphere and seminary or required religious training."[45] The final exception was the *Catholic Bishops* test was not applicable since the EPA interpretation accepted by this court was not, in their view, a violation of the Constitution. This case raises some serious questions that could eventually reach the Supreme Court.

In a Kansas EPA claim, the court noted that the EPA has a time limitation of three years from the time plaintiff becomes aware of the discrepancy in pay.[46] Therefore, plaintiffs' claims prior to October 1978 were time barred, but discrimination claims subsequent to that date were still alive and should be reviewed by the court.

Several cases emerged involving charges of reverse discrimination in the application of court-ordered salary equity plans for females. An Illinois case involved a male plaintiff who charged that the university's equity formula resulted in females receiving higher salaries simply on the basis of gender, in violation of the Equal Pay Act.[47] The university, operating under an Office of Civil Rights order, developed a salary equity plan for females that was based on a "university-wide male average formula" without considering fair market factors. The result was that in departments with lower than average salaries females were

43. Russell v. Belmont College, 554 F. Supp. 667 (M.D. Tenn. 1982).
44. 440 U.S. 490 (1979).
45. Russell v. Belmont College, 554 F. Supp. 672 (M.D. Tenn. 1982).
46. Billings v. Wichita State Univ., 557 F. Supp. 1348 (D. Kan. 1983).
47. Ende v. Board of Regents of N. Illinois, 565 F. Supp. 501 (N.D. Ill. 1983).

now making more than equivalent "time" and "rank" males as a direct result of the equity formula. The district court, citing *Regents of the University of California v. Bakke*[48] and *United Steelworkers of America, AFL-CIO v. Weber*,[49] argued that a male could be discriminated against temporarily to right a previously wronged "class" based on an administrative finding of salary discrimination. The district court acknowledged its disagreement with a similar case in Pennsylvania.[50] In the Pennsylvania case, the district court found under similar circumstances that the salary equity plan put males under a permanent salary disadvantage in violation of EPA. The court ordered the university to revise its plan to eliminate gender-based discrimination. This more narrow view, based on *Weber*, holds that discrimination can continue only where it is unavoidable to right a previous wrong.

8.2a(5) Age Discrimination in Employment Act (ADEA)

While the scope of federal authority under ADEA was discussed in the section on Intergovernmental Relations, an actual Age Discrimination in Employment Act claim was adjudicated in an Oklahoma case.[51] A fifty-nine-year-old woman technician in the Geological Survey Office applied for but was not hired as the chief cartographic draftsperson. A decision had been made to hire an outside person by an eleven-person committee. The plaintiff filed two charges; first, that she was not hired for the position because of her age; and second, that she was retaliated against for bringing age discrimination charges. A jury found in favor of the plaintiff. The defendant institution filed a "motion for judgment notwithstanding the verdict." The district court reviewed the evidence presented at trial in light of the shifting burden of proof in ADEA cases. Like Title VII cases, the burden is on the plaintiff to establish a prima facie case. The plaintiff, a person within the age limits of ADEA (forty to seventy years of age), qualified to fill the vacant position, was passed over for a person age thirty-six. This information established the prima facie case.

The burden then shifted to the defendant to show that valid reasons existed for hiring someone else. The evidence showed that the university decided that problems in the unit, some attributable to the plaintiff, resulted in a decision to seek an outside person. All members of the committee, some of whom were within the defined age (forty to seventy),

48. 438 U.S. 265 (1978).
49. 443 U.S. 193 (1979).
50. Lyon v. Temple Univ., 543 F. Supp. 1372 (E.D. Pa. 1982).
51. EEOC v. University of Oklahoma, 554 F. Supp. 735 (W.D. Okla. 1982).

testified that age was not a consideration but rather that the hired individual was more qualified for the position than the plaintiff. Finally, the plaintiff has the burden to prove that the reasons provided by the defendant are a mere pretext for discrimination. Evidence that she did not have a good working relationship with the director of the unit was not evidence of mere pretext, when an eleven-person committee made the selection. Plaintiff's failure to meet the requirements of the third part of the shifting burden automatically resulted in granting the defendant's motion for judgment notwithstanding the verdict.

8.2a(6) Rehabilitation Act of 1973

In Arizona, a handicapped psychology professor at a state university brought charges of discrimination under sections 503 and 504 of the Rehabilitation Act of 1973, 42 U.S.C. § 1983, and the Revenue Sharing Act.[52] The district court granted a summary judgment to the institution on the basis that the plaintiff lacked a right to private action.[53] The plaintiff appealed on his claims under sections 503 and 504 and section 1983. The circuit court affirmed the lower court's opinion. A private right of action exists under section 504 of the Rehabilitation Act only where the primary objective of the federal financial assistance is to provide employment. This was not the primary objective of research grants given to the defendant institution as training grants for clinical psychologists. Also, under section 503 there is no provision for a right to private action. Finally, section 1983 does provide a private right to action for a violation of a federal statute under color of state law. However, the Supreme Court has enumerated two exceptions: (1) where the statute in question specifically prohibits a private right to action, or (2) where the statute does not create enforceable rights.[54] The circuit court, relying on a previous decision,[55] found that the administrative scheme provided by Congress in section 503 was intended to preclude any private right under section 503 of the Rehabilitation Act. Therefore, since the plaintiff lacked a private right to action in a court of law under any of the above-named statutes, the summary judgment in favor of the defendant university was upheld.

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52. Meyerson v. Arizona, 709 F.2d 1235 (9th Cir. 1983).
53. Meyerson v. Arizona, 507 F. Supp. 859 (D. Ariz. 1981); Meyerson v. Arizona, 526 F. Supp. 129 (D. Ariz. 1981).
54. *See* Middlesex Cty. Sewage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Pennhurst State School & Hospital v. Holderman, 451 U.S. 1 (1981).
55. Fisher v. City of Tucson, 663 F.2d 861 (9th Cir.), *cert. denied*, 103 S. Ct. 178 (1982).

8.2a(7) Hiring Discrimination

Four cases serve to clarify legal obligations in the area of hiring. A case involving claims of discrimination in employment based on the applicant's nationality established some statutes of limitation for filing under 42 U.S.C. §§ 1981 or 1983.[56] The court ruled that since no statute of limitations for filing exists under sections 1981 and 1983, the courts must rely on appropriate and applicable state statutes. A Kansas statute allowing a two-year time limit to bring charges for injury to the rights of another, but not based on a contract, governs in this case. The plaintiff failed to meet the two-year limit and a summary judgment to the defendant university was upheld.

In a Florida case, the question was raised regarding the application of "Sunshine Laws" to a search and screening committee and faculty deliberations in the selection of a new law school dean.[57] The Florida "Sunshine Law" applied specifically to meetings of "boards" or "commissions" of any state agency. The court found that neither faculty nor the search committee were a "board" or a "commission" within the meaning of the provisions of the "Sunshine Law." Therefore, the "Sunshine Law" did not apply to this hiring process.

In a Kansas case, a black male plaintiff brought charges of discrimination in his unsuccessful attempt to gain an administrative position at a state medical college.[58] The charges were brought under 42 U.S.C. §§ 1981 and 1983 and Titles VII and VI of the Civil Rights Act of 1964 against the state, its agencies, and individuals named officially and individually. The court held that the state's immunity under the eleventh amendment barred suits brought against state agencies and officials in Kansas under sections 1981 and 1983, whereas claims against persons in their "individual capacities" were not dismissed under the eleventh amendment immunity clause. All charges under the federal statutes were dismissed, however, since the plaintiff failed to show that he had exhausted all administrative remedies through EEOC prior to filing a federal law suit.

A 1981 Maryland case[59] involving a Marxist professor's civil rights claims concerning his political beliefs came before the Fourth Circuit Court of Appeals.[60] The district court had ruled that the claimed failure of the president to select the Marxist professor as department chairman because of his political beliefs was not substantiated in fact.

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56. Garcia v. University of Kansas, 702 F.2d 849 (10th Cir. 1983).
57. Marston v. Wood, 425 So. 2d 582 (Fla. Dist. Ct. App. 1983).
58. Wrenn v. Kansas, 561 F. Supp. 1216 (D. Kan. 1983).
59. Ollman v. Toll, 518 F. Supp. 1196 (D. Md. 1981).
60. Ollman v. Toll, 704 F.2d 139 (4th Cir. 1983).

They ruled that the president's decision was based on valid academic reasons that would have resulted in a similar decision regardless of the professor's published political stands. The circuit court affirmed the decision.

8.2a(8) Sexual Harassment

A former employee of a community college in Florida filed suit alleging sexual harassment.[61] She charged that the president of the institution had offered "sexually seductive invitations" to her on numerous occasions. She based her claim on the "tort of intentional infliction of emotional distress," which has its origins in the *Restatement (2d) of Torts*, § 46. The District Court of Appeals of Florida held that this tort does not exist under Florida law. However, as there was some discrepancy in several cases on the existence of the tort in Florida, this court asked the Florida Supreme Court to resolve the issue. The court also asked the Florida Supreme Court to determine whether the trial judge acted appropriately in ruling on the pleadings that the president's conduct was not "so extreme or outrageous to permit recovery" or should such a determination be based on factfinding. The plaintiff was also unable to show a connection between sexual harassment and nonrenewal of her contract.

8.2b Nontenured Faculty

The volume of litigation involving nontenured faculty continues to be heavy, reflecting financial and job market factors. These cases continue to be concentrated in three areas: (1) claims of first amendment freedom of speech violations in nonrenewal decision, (2) claims of procedural violations in nonrenewal decisions, and (3) clarification of the rights of part-time faculty.

8.2b(1) First Amendment Freedom of Speech

In the conclusion of a case that began in 1971 involving a denial of tenure in violation of the faculty member's first amendment rights, the court awarded damages to the plaintiff.[62] In reviewing the facts, the court found that the faculty member had advised a student who was dismissed from the institution to seek legal counsel. The defendant institution argued that the faculty member's failure to discuss the matter with the dean of students or consult the student's file before giving

61. Gmuer v. Garner, 426 So. 2d 972 (Fla. Dist. Ct. App. 1982).
62. Stern v. Sholdice, 706 F.2d 742 (6th Cir. 1983).

advice showed that the plaintiff undertook his advising responsibilities in a "cavalier and immature fashion." The Sixth Circuit found that the plaintiff's first amendment free speech rights had been violated by the use of this reason for a nonrenewal decision. The court, however, for technical reasons, refused to affirm the lower court's award of back pay.

8.2b(2) Nonrenewal Procedures

In this section numerous cases illuminate effective and inappropriate procedures. In a very complicated case, an Asian Indian professor who was denied tenure sued the institution for discrimination on the basis of national origin.[63] The plaintiff had been reviewed at the departmental and school level and recommended for tenure. Certain reservations about his teaching and references to his national origin were expressed by the dean in his recommendation to the provost. There were a number of decisions by the provost's office to deny tenure and subsequent appeals on behalf of the plaintiff by the dean and department head. Further, a report conducted by students was alleged to be tainted with questions of validity and racism and was ordered removed from his record. Plaintiff, during these reviews and the subsequent grievance and appeal procedure, upon requested reviews of his file, repeatedly found information missing from his file that would show he had met certain criteria. He also found that the controversial student report that was to have been expunged was repeatedly included in his file. The district court found that a prima facie case had been established for discrimination. The university's reasons were found to be a mere pretext for discrimination. The repeated decisions without key documents and the inclusion of the controversial student report were several factors in the court's decision. Further, the court noted that loss of confidence in the business school's rigor in making tenure decisions was inconsistent with a decision the next year to grant tenure based on the school and departmental recommendations. Also, the institution had put greater emphasis on teaching in this tenure decision case than it had in others. The court awarded the plaintiff back pay through 1983 but did not uphold a back pay award based on a lifetime of employment. The plaintiff did not ask for tenure or reinstatement. Attorney's fees were also awarded to the plaintiff.

In another case a nontenured faculty member alleged that both his liberty interest and property interest had been violated when he was issued a terminal contract.[64] The assistant professor, who possessed a

63. Kumar v. Board of Trustees of Univ. of Massachusetts, 566 F. Supp. 1299 (D. Mass. 1983).

64. Wells v. Doland, 711 F.2d 670 (5th Cir. 1983).

master's degree, was recommended for tenure twice by the dean of the humanities school, but eventually was issued a terminal contract. The reason given by the institution in court was that plaintiff's teaching was not up to par and that the program was being upgraded by seeking a teacher with a doctorate. The district court issued a summary judgment in favor of the defendant. The Fifth Circuit Court upheld the lower court opinion in regard to any property interest claims by the plaintiff. They noted that recommendations to award tenure do not result in de facto tenure or a reasonable expectation of continued employment; therefore, the plaintiff lacked a property interest. However, the court remanded the case on the liberty interest claim. They noted that the evidence did not indicate whether statements about the plaintiff's teaching skills had been made public at the time of termination. Public pronoucements would implicate a liberty interest. The instructions given by the Fifth Circuit indicated that a finding of a liberty interest did not require reinstatement or awarding of tenure and back pay, but rather the awarding of equitable monetary damages.

An Illinois professor claimed a breach of contract in the institution's decision not to award tenure.[65] The institution's tenure committee, on review of the plaintiff's dossier, recommended that tenure not be granted. On review, the president of the institution felt that the committee had erred in not considering two letters of recommendation and recommended that the professor's dossier be returned to the committee for another evaluation. The board of trustees of the institution overruled the president's recommendation and denied tenure. The district court ruled that the board had the ultimate authority to award tenure and was within the law in overruling the president's recommendation. The board had not breached a contract.

In an Alabama case, the district court found that the university had breached a contract after it granted a one-year extension and subsequently denied tenure.[66] The faculty member had a dual faculty appointment in an innovative college and an interdisciplinary program in the college of arts and science. Both programs emphasized teaching; however, the plaintiff's research record, while substantial, was viewed as inadequate by the college of arts and science review committee. The academic vice-president, because of the nature of plaintiff's assignment, the promotion and tenure policies, and the decision of the colelge committee, extended the probationary period for one more year. In his letter, he explained to the plaintiff that she had one more

65. Ranyard v. Board of Regents, 708 F.2d 1235 (7th Cir. 1983).
66. Gladney v. Thomas, 573 F. Supp. 1232 (N.D. Ala. 1983).

year to improve her publications record, the only deficient area. The plaintiff had two additional articles published in refereed journals during that year, but tenure was denied. The court ruled that the university had breached a contract with the plaintiff. The court noted that the letter from the vice-president could be interpreted in one of two ways. One interpretation was that it was impossible for the plaintiff to improve her record in one year, which would be viewed by the court as a bad faith contract. The other interpretation was that it was possible for her to improve her publication record, which she had done; thus, a finding of a breach of contract and the order to award the plaintiff tenure.

Another breach of contract claim was an appeal from an order to award tenure where an Arizona appeals court ruled that plaintiff's contract had been breached when he was not reviewed in his sixth year. The appeals court reversed the tenure order and ordered only the appropriate tenure review process.[67]

In a Pennsylvania case, the court ruled that failure to seek review of a decision not to grant tenure within the university's established appeal procedures precluded plaintiff's ability to seek a breach of contract claim. Further, the court ruled that as a nontenured faculty member, he failed to show a property or liberty interest requiring due process. The court granted the defendant institution a summary judgment.[68] In a subsequent decision, the court ruled that receipt of money by the institution and appointment to the institution's board of trustees of the state's nominee did not make the private institution's employment decision a state decision subjecting it to section 1983 claims.[69]

Several other property right and liberty interest cases were also before the courts. In a North Dakota case, six consecutive one-year contracts did not establish a property right,[70] while a Mississippi case found neither a property right or liberty right where a one-year probationary contract was not renewed, without public pronouncements.[71] In a Wisconsin case, a professor was not entitled to tenure review in his seventh year after denial in his sixth year.[72] In an Alaska case, the court ruled that the regulations under the Public Meeting Act govern tenure committee procedures.[73]

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67. Smith v. University of Arizona, 672 P.2d 187 (Ariz. Ct. App. 1983).
68. Krynicky v. University of Pittsburgh, 560 F. Supp. 803 (W.D. Pa. 1983).
69. Krynicky v. University of Pittsburgh, 563 F. Supp. 788 (W.D. Pa. 1983).
70. Sacchini v. Dickinson State College, 338 N.W.2d 81 (N.D. 1983).
71. Montgomery v. Boshears, 698 F.2d 739 (5th Cir. 1983).
72. Pfeiffer v. Board of Regents of Univ., 328 N.W.2d 279 (Wis. 1983).
73. University of Alaska v. Geistauts, 666 P.2d 424 (Alaska 1983).

8.2b(3) Part-Time Faculty

In a California case a part-time employee charged that the institution failed under state regulations to establish a procedure for notification of nonrenewal of a temporary employee contract.[74] The California court ruled that the institution had failed to establish these procedures, but this failure had a harmless effect on the plaintiff since she was warned six months prior to the end of the contract period that her contrct might not be renewed.

In another California case, part-time employees sued, demanding a pro rata pay rate equivalent to that paid to full-time regular instructors.[75] The court ruled that part-time employees are entitled to a pay scale prorated but equivalent to that paid to full-time instructors who are doing the same work.

8.2c Tenured Faculty

Controversies involving the relationships between tenured faculty and institutions are subdivided into several areas: (1) termination for cause, (2) denial of employee privileges associated with a faculty position, and (3) terminations or reductions resulting from financial exigencies or program elimination.

8.2c(1) Termination for Cause

A number of cases were decided this year involving termination for cause. A case that previously challenged the constitutionality of rules prohibiting concurrent full-time employment was again before the court.[76] In the current case plaintiff charged that the rule prohibiting concurrent employment was applied by the college in an arbitrary and capricious manner in violation of the fourteenth amendment.[77] Plaintiff based this charge on the fact that from its inception in 1969 until 1980 this rule in the collective bargaining agreement was not enforced. Plaintiff maintained that in order to revive the rule the defendant should have warned and notified the faculty. Defendants' decision to enforce the rule resulted in the dismissal of thirty faculty. The district court found that the defendants had operated in an arbitrary and capricious manner by failing to enforce a rule for ten years and then commencing enforcement without adequate notice. The institution's argument that administrative efficiency had prevented enforcement

74. Tiernan v. Trustees of California State Univ., 655 P.2d 317 (Cal. 1983).
75. Ferris v. Los Rios Commun. College Dist., 194 Cal. Rptr. 16 (1983).
76. *See* YEARBOOK 1982 at 265; Kaufman v. Board of Trustees, Commun. College, 522 F. Supp. 90 (N.D. Ill. 1981).
77. Kaufman v. Board of Trustees, Commun. College, 552 F. Supp. 1143 (N.D. Ill. 1982).

was not a defense to charges of arbitrary and capricious actions by the institution.

In an Illinois case, the plaintiff was given a sixty-day suspension by the board of trustees of the community college.[78] The faculty member sued, claiming that the board exceeded its authority in suspending him for sixty days and further that failure to grant a request to have the case heard by an independent hearing agent violated his due process rights. The Illinois Appellate Court ruled that a rule authorizing the chancellor to suspend faculty for thirty days as a disciplinary measure did not imply that the board could suspend for longer periods, and therefore limited his suspension to thirty days. The court also ruled that the institution did not violate any rights by its failure to grant a hearing before an independent agent, as opposed to the committee that heard the case.

In another case, a tenured faculty member who twice refused to teach an assigned course was dismissed.[79] The first refusal resulted in a hearing in which the committee recommended that the plaintiff be required to teach the course but not be dismissed. The next year the faculty member received a contract stating that if he failed to accept the teaching assignment, he would be dismissed. After the second refusal a hearing was held and the plaintiff was dismissed. The court ruled that the institution's due process guarantees had been met and that plaintiff's free speech had not been violated.

In a West Virginia case a tenured faculty member who was given a hearing and ordered terminated by a hearing agent could not actually be removed or denied pay until such time as the appeals procedures within the institution have been completed.[80] The court further noted that the specific charges against the faculty member were never clearly stated, which was a violation of his due process rights. They remanded the case to the hearing agency to correct the due process errors. Further, the court ruled that any back pay award could not exceed his contracted salary for that year.

8.2c(2) Denial of Employee Privileges

A mathematics professor at a community college who received a Ph.D. in the study of higher education was denied additional salary compensation for the doctorate.[81] The department head refused compensation because the degree was not in the faculty member's area of

78. Inwang v. Community College Dist. No. 508, 453 N.E.2d 896 (Ill. App. Ct. 1983).
79. Smith v. Kent State Univ., 696 F.2d 476 (6th Cir. 1983).
80. Clarke v. West Virginia Bd. of Regents, 301 S.E.2d 618 (W. Va. 1983).
81. Perez v. Laredo College, 706 F.2d 731 (5th Cir. 1983).

teaching as stated in the school's policy. The district court ruled that the plaintiff's Title VII and equal protection claims were time barred as governed by state statutes. However, the Fifth Circuit Court ruled that the equal protection clause violation was continuous because the school had awarded salary compensation to other faculty with doctorates outside their teaching areas. Each day that these faculty received salaries different from the employee's was a continuing violation under the equal protection clause. They remanded the case for further proceedings on the equal protection clause claim.

8.2c(3) Financial Exigencies

A case involving a Jewish American who lost his administrative position because of a financial exigency has implications for faculty financial exigency issues.[82] The institution, under severe financial crises, was ordered to reduce staff. The planned reductions were to take place in noneducational program areas. The plaintiff charged that the plan was based on a quota system that used national origin as a criterion and filed under a state human rights decision. The court, on appeal from a lower court, reversed the lower court decision in favor of the plaintiff.[83] The Court of Appeals of New York found that the plaintiff inappropriately relied on a statistical report conducted by the affirmative action office. The purpose of that report was to analyze the results of the reductions and was not the basis of the institution's decision to remove the plaintiff. Further, the court reiterated the position that statistics alone do not prove employment discrimination without evidence that actual employment practices were discriminatory. In this case, the reason for the employee's termination—that he was not qualified to teach at the college—was a valid nondiscriminatory reason. Further, the president's pronouncements that the retrenchment plan should not unduly harm any one group and his awareness of the ethnic makeup of the school's employees did not substantiate plaintiff's charge.

Another case involving financial exigencies resulted in the reduction of a black faculty member's contract.[84] The plaintiff filed suit, charging that discrimination at the university resulted in reduction of his twelve-months' contract to nine months, salary increases smaller than others in his department, and harassment. The plaintiff was given unusual benefits at the time he was hired, such as a twelve-months'

82. CUNY-Hostos Commun. College v. State H.R.A.B., 449 N.E.2d 1251 (N.Y. 1983).
83. CUNY-Hostos Commun. College v. State H.R.A.B., 444 N.Y.S.2d 973 (N.Y. App. Div. 1980).
84. Tolliver v. Yeargan, 567 F. Supp. 116 (W.D. Ark. 1983).

contract, rank as an associate professor, and tenure after one year. In the ensuing five years, his research and teaching were found to be substandard. The plaintiff was unable to establish a prima facie case for discrimination. His salary raises were similar to another white faculty member in his department with similar job responsibilities and performance evaluations. The reasons for salary differentials were found by the court to be based on valid performance criteria. The contract reduction was based on financial exigencies; plaintiff, through summer school employment, was still employed for twelve months; and a nine-months' contract is the typical arrangement the school had with other faculty. Finally, the harassment charges were found to be groundless.

8.2d Collective Bargaining

A Minnesota case challenging the exclusive bargaining rights of a faculty union was argued before the Supreme Court.[85] The district court decision had raised three questions.[86] First, does recognition by the state of a private agency as the exclusive bargaining agency constitute an "impermissible delegation of state sovereignty"? Second, does the compulsory collection of fair share fees from nonmembers constitute "forced association," with a political party? Finally, does the meet and confer provision, which allows only the union to select members of the meet and confer committees, violate plaintiff's first amendment rights? The district court, citing *Abood v. Detroit Board of Education*,[87] ruled that the union's assignment as the exclsuvie bargaining agent for faculty was not an impermissible delegation of state power. Further, based on *Abood*, the court found that collection of air share fees from nonmember employees did not force them to associate with a contrary political party since unions are promoting economic issues and the plaintiff made no showing that the money went to promote political activity. However, the court did find that exclusive union representation on meet and confer committees did violate the plaintiff's first amendment freedom of speech and associational rights.

The question of required arbitration in nontenure decisions was before the court in several companion cases before the Hawaii Supreme Court. These cases involved the question of whether a university decision not to promote and give tenure to a number of faculty should be

85. Minnesota Commun. College Bd. v. Knight, 52 U.S.L.W. 3008 (U.S. Nov. 11, 1983).

86. Knight v. Minnesota Commun. College Faculty Ass'n, 571 F. Supp. 1 (D. Minn. 1982).

87. 431 U.S. 209 (1977).

subject to arbitration. In the first case, the court found that arbitration as provided by the collective bargaining agreement should be compelled. Further, the court ruled that the university clearly has the authority to set criteria for promotion and tenure that must be accepted by the arbitrator. The arbitrator, according to the court, must follow the university's decision unless he finds they failed to use the criteria.[88] In a second case, the court found that an arbitrator could award tenure if he found the university official acted in an arbitrary and capricious manner but a rehearing would be required to reach such a finding.[89] In a third case, the court found that an arbitrator could substitute his evaluation of the criteria for that of a university official and award tenure, but he could not empanel a new tenure review committee to make these judgments for him.[90] In the final case, the court ruled that an arbitrator may not decide which of the criteria as set out by the university should be used in deciding whether the faculty member should be promoted.[91]

8.2e Administration and Staff

A number of cases challenging dismissals have surfaced in 1983. In an Illinois case a psychologist, holding a contract that stated that he served at the pleasure of the president, recently moved from a one-year contract to a "continuous appointment" and was later dismissed with a twelve-months' notice of dismissal.[92] Institutional policy required that a continuous employee's dismissal without cause required a notification twelve months prior to termination. The plaintiff sued, alleging a violation of is due process rights since had had a reasonable expectation of employment (property right). The Seventh Circuit Court ruled that dismissal with twelve months' advance notice without cause was permissible for employees serving at the pleasure of the president. The plaintiff was found to be without a property interest under these circumstances.

In a California case a female police officer was removed from her position at the college because of dishonest use of sick leave, discourteous treatment of fellow employees, inattention to and dereliction of duty,

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88. University of Hawaii Professional Assembly v. University of Hawaii, 659 P.2d 717 (Hawaii 1983).

89. University of Hawaii Professional Assembly, Daeufer v. University of Hawaii, 659 P.2d 720 (Hawaii 1983).

90. University of Hawaii v. University of Hawaii Professional Assembly, Wiederholt, 659 P.2d 729 (Hawaii 1983).

91. University of Hawaii v. University of Hawaii Professional Assembly, Watanabe, 659 P.2d 732 (Hawaii 1983).

92. Grimes v. Eastern Illinois Univ., 710 F.2d 386 (7th Cir. 1983).

and insubordination.[93] Plaintiff sued, alleging violations of her liberty and property interests under the fourteenth amendment and Title VII discrimination on the basis of sex. The district court found no Title VII violation, but found that fourteenth amendment due process rights were violated. The Ninth Circuit Court affirmed that her property rights but not her liberty interest had been violated because her employment was terminated immediately on notification of the charges. However, actual termination should not have taken place until after all established hearing and appeals procedures had been satisfied. The court remanded the case for a new determination of the amount of damages.

In a case before the North Dakota Supreme Court a retiring administrator was ordered to take his annual leave at his convenience prior to his retirement.[94] Failure to make arrangements to take annual leave resulted in its being accrued during the final days of his employment. The result was that the plaintiff was ordered to vacate his office prior to his retirement day after twenty-four years of service to the institution. The court ordered the institution to pay the employee for accrued annual leave. They noted that payment of annual leave had taken place in other retirements. The employee's offer of services while the institution banned him access to his office did not equal failure to perform services negating the compensation for annual leave.

In the final case of this section, a former dean of education, dismissed by the board of trustees of the institution sued, alleging defamation and violations of his civil rights.[95] The Louisiana Court ruled that the board meetings were not subject to state open meeting laws, that the mere act of dismissal was not an act of defamation, and that the president's pronouncements regarding the dean's performance were not made to the board. None of these actions implicated a liberty interest.

8.3 STUDENTS

The area of students' rights saw a very active year. Nonresident tuition questions were back in the courts this year. The federal government loan default cases continued, along with a question of separation of church and state in the awarding of state student aid. First amendment issues were numerous and involved commercial speech, associational rights of single-sex honorary societies, and freedom of press issues

93. Jones v. Los Angeles Commun. College Dist., 702 F.2d 203 (9th Cir. 1983).
94. Aasmundstad v. Dickinson State College, 337 N.W.2d 792 (N.D. 1983).
95. Hicks v. Stone, 425 So. 2d 807 (La. Ct. App. 1983).

surrounding institutional funding schemes for student newspapers. Disciplinary dismissal and academic dismissal cases continued to illuminate student rights in these two areas. Cases involving questions of student rights under federal regulations and National Collegiate Athletic Association (NCAA) eligibility regulations round out this section.

8.3a Admission

The one case in this area concerns discrimination on the basis of sex in a denial of admission to medical school. This case is the third part of a trilogy of claims that commenced in 1974. The first case, *Cannon v. University of Chicago*, established the right to private action under Title IX.[96] On remand the district court and the circuit court affirmed a dismissal for failure to establish purposeful discrimination.[97] In the present case, the plaintiff had alleged that she was discriminated against on the basis of sex and race in a medical school's denial of her application for admission.[98] The court granted a summary judgment to the defendant institution. They found the eleventh amendment barred a suit against a state institution or its individual officers. They also noted, for purposes of laches, that plaintiff's delay in filing suit was not excusable and the suit was time barred.

8.3b Nonresident Tuition

Numerous cases were heard this year that dealt with challenges to the constitutionality of state classifications of students as nonresidents for the purpose of tuition and fees. Challenges came under both the eleventh and fourteenth amendments.

In a Maine case students alleged that (1) the state required a greater burden of proof for students seeking reclassification as residents than it did at the time of admission; (2) they were discriminated against by policies that allowed married nonresidents to assume the classification of their resident spouse and by the automatic resident classification of military personnel; and (3) a de facto "irrebutable presumption" of nonresidency existed.[99] They alleged violations of due process and equal protection under the fourteenth amendment. The court ruled that a nonresident student who is enrolled in the university will be presumed

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96. *See* YEARBOOK 1982 at 46; Cannon v. University of Chicago, 441 U.S. 677 (1979).

97. *See* YEARBOOK 1982 at 267; Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981), *cert. denied*, 103 S. Ct. 1254 (1983).

98. Cannon v. University of Health Sciences/Chicago Medical School, 710 F.2d 351 (7th Cir. 1983).

99. Black v. Sullivan, 561 F. Supp. 1050 (D. Me. 1983).

to be in the state for educational purposes only and has the burden of proving otherwise. The court also noted that the appropriate equal protection test was whether the residency law had a rational relationship to the integrity of a citizen's tax contribution. Further, in this case state-subsidized postsecondary education was viewed as not being a fundamental constitutional right. As a result, there was no equal protection violation by automatic reclassification of some individual due to state interest in doing so. Finally, the court indicated that there were no due process violations in the denial of the requests in question. However, the institution's requirement that the individual must be a bona fide resident of the state for one year prior to being reclassified as a resident violated the equal protection clause. The court distinguished this rule from the one-year rule to establish residency in *Starns v. Malkerson*.[100]

In a Wisconsin case, the Seventh Circuit ruled that the fourteenth amendment due process clause did not require a written reason for the denial of a request for residency reclassification.[101] A Wisconsin statute dealing with classification of students was also dealt with. The court noted that this statute provided the equal protection guarantees noted above by providing students the opportunity to rebut the presumption of continued nonresidency. In its ruling the court indicated that no property or liberty interests were contravened by the action of the residency review committee. It also noted that there is a legitimate government interest in preserving state institution quality and the right of instate students to attend state colleges. This interest was protected by the diversity of tuition levels. Finally, the court stated that the imposition of requirement of a statement of reasons for denial would "impose significant administrative and fiscal burdens on the state; and the crush of erroneous decisions under the procedures now used is reasonably minimized."[102]

A third case heard by the District Court in Rhode Island also raised the due process issue.[103] Here the court ruled that the student's due process rights had not been violated by the regulations. The regulations were fair and not applied in an arbitrary manner.

In a related case the Nevada District Court was asked to grant a preliminary injunction enjoining enforcement of a Nevada statute that required a five-years residency in the state to qualify for graduate and professional school financial aid funds through Western Interstate

100. *Id.* at 1066; *see also* Starns v. Malkerson, 326 F. Supp. 234 (D. Minn. 1970), *aff'd mem.*, 401 U.S. 985 (1971).
101. Lister v. Hoover, 706 F.2d 796 (7th Cir. 1983).
102. *Id.* at 805.
103. Vanlaarhoven v. Newman, 564 F. Supp. 145 (D.R.I. 1983).

Commission for Higher Education (WICHE).[104] The plaintiffs in the case raised fourteenth amendment equal protection as well as privileges and immunities questions. The court threw out the privileges and immunities claims, but noted that a strong possibility existed that the plaintiffs would prevail in their equal protection challenge. They stated that the five-years residence requirement seemed not to be rationally related to valuable state interests of having persons who receive scholarships return to Nevada after graduation. As a result, equal protection guarantees could be threatened.

An Indiana case rounds out the growing litigation on nonresident tuition. In that case the procedures and decisions of a committee that determined residency were upheld.[105]

8.3c Financial Aid

8.3c(1) Student Loan Default Collections

One case in this section involved a government suit to recover the principal plus interest on defaulted loans under a government student loan program.[106] The defendant asked for a summary judgment on the grounds that the suit was time barred due to a six-year statute of limitations. The defendant alleged that the six-years period began in 1972 when she assumed the loan. The United States alleged that the time period began in 1974 when the government paid the private lender and assumed the loan. The court ruled that consistent with other suits[107] the government established its right to sue for default after it paid the private bank's claim and the time for the statute of limitations was calculated from that date.

In a case heard in the District of Columbia, the United States sued a student who had defaulted on a federally guaranteed student loan.[108] The student argued that he had the same right to present defense against government collection of the loan as he had against the school's collection procedures. This right had been precluded since the district court[109] had granted summary judgment for the government. The student alleged that the "school salesman used high-pressured tactics to sell empty dreams to the poor and hopeless, that [the] school was shamefully inadequate and that defaults were common because

104. Kuhn v. Vergiels, 558 F. Supp. 24 (D. Neb. 1982).
105. Allen v. Scherer, 452 N.E.2d 1031 (Ind. Ct. App. 1983).
106. United States v. Tilleraas, 709 F.2d 1088 (6th Cir. 1983).
107. *See* YEARBOOK 1983 at 312-13.
108. United States v. Griffin, 707 F.2d 1477 (D.C. Cir. 1983).
109. *See* YEARBOOK 1983 at 313; United States v. Griffin, 530 F. Supp. 604 (D.D.C. 1982).

students often emerged with no marketable skills."[110] The court held that the student's defense should be heard and reversed and remanded for a hearing on the merits of the case. The court viewed this case as unique since the school had closed and was found to be somewhat inadequate in its academic programs.

8.3c(2) Student Aid Grants

The question of separation of church and state was raised by a state student grant program in North Dakota.[111] The district court ruled that a 1981 amendment to the statute governing the state's tuition assistance grant program was violative of the first amendment establishment clause. The statute provided state grant-in-aid monies based on financial need to students attending two Bible colleges in the state.

The two Bible colleges were accredited not by the North Central Association of Colleges, as were the other colleges in the state, but by the American Association of Bible Colleges. The court ruled that this statute clearly violated all three prongs of the test in *Lemon v. Kurtzman*.[112] The nature of the statute was such that (1) it has a religious purpose, (2) it promotes religion, and (3) it fosters excessive government entanglement with religion. The fact that the money was given to students did not insulate the aid program from these problems.

8.3d First Amendment

The cases in the area of first amendment rights have been organized into three basic areas: freedom of speech, freedom of association, and freedom of the press.

8.3d(1) Freedom of Speech

This year several cases were heard involving commercial speech or solicitation in institutionally owned residence halls. All of these cases involved American Future Systems, Inc. (A.F.S.), which sells housewares to college students in meetings held on campus. The cases reviewed in this section represent conflicting positions by the courts concerning the question of whether prohibition of solicitation in institutionally owned residence halls is in violation of first amendment speech and association guarantees.

In a Pennsylvania case[113] several students and A.F.S. sued the university, alleging that university regulations prohibiting solicitation

110. Griffin, *supra* note 108, at 1478.
111. d'Errico v. Lesmeister, 570 F. Supp. 158 (D.N.D. 1983).
112. 403 U.S. 602 (1971).
113. American Future Sys., Inc. v. Pennsylvania State Univ., 568 F. Supp. 666 (M.D. Pa. 1983).

in residence halls violated first amendment guarantees. A previous ruling by the district court[114] granting a preliminary injunction allowed the institution to continue enforcement of the rules until the present case was litigated. The district court found the regulations in violation of the first amendment. In the opinion of the court, the university failed to demonstrate a compelling state interest to regulate commercial speech. The institution's regulations failed to provide for ample alternative channels for the communication of information.[115] The flow of information that students might receive from attendance at such a solicitation meeting was a protected right guaranteed by the first amendment.

In contrast, a New York case yields a different opinion. Students and A.F.S filed suit alleging violations of first amendment guarantees through a state university's regulations that prohibited solicitation in residence halls, including invited group demonstrations held in a student's room.[116] In this opinion, the district court differentiated between "pure speech" and "commercial speech." The court applied less stringent standards of protection to avoid violations in areas of commercial speech. While the university could not prohibit the exchange of information through product demonstration, it could prohibit consummation of sales at the conclusion of the demonstration. The court found the state had a legitimate and compelling interest in "preventing disruption, protecting the safety and security of students, and protecting students from commercial exploitation."[117] Thus, while the institution could not prohibit the dissemination of consumer information, it could prohibit commercial transactions. The resolution of these conflicting opinions will be a matter for further litigation, ultimately perhaps before the Supreme Court.

8.3d(2) Freedom of Association

Freedom of association and due process rights under the first and fourteenth amendments were the topics of consideration in a case heard before the district court in Louisiana.[118] Here, a graduate assistant at Louisiana State University was moved from a teaching position to a research position when it was learned that she was involved in a

114. American Future Sys., Inc. v. Pennsylvania State Univ., 553 F. Supp. 1268 (M.D. Pa. 1982).
115. American Future Sys., Inc. v. Pennsylvania State Univ., 568 F. Sup. 755 (M.D. Pa. 1983).
116. American Future Sys., Inc. v. State Univ. of Cortland, 565 F. Supp. 754 (N.D.N.Y. 1983).
117. *Id.* at 764.
118. Naragon v. Wharton, 572 F. Supp. 1117 (M D. La. 1983).

homosexual relationship with a student who was not in any of her classes. The plaintiff raised first amendment associational questions, as well as fourteenth amendment due process and equal protection claims, citing instances in which similar heterosexual relationships did not result in similar action. The court ruled that her first amendment associational rights had not been violated since no effort was made by the university to prohibit her private relationship. The only conduct that was altered was job related. The fact that her employers considered her actions to be detrimental to the university was a valid reason for the employer's action. The court also noted that her due process claim failed because no liberty or property rights were violated by the university since she had no right to continued employment as a teacher and was subjected to no stigma by the university's action. Finally, the court ruled that the plaintiff had not been discriminated against since a compelling state interest existed to resolve problems related to the situations created by her teaching assignment.

Another freedom of association case involved an all-male honorary society at a private institution in Florida.[119] The case resulted when the Department of Health and Human Services (HHS) threatened to remove federal funding because the university recognized a prestigious all-male honorary society in violation of Title IX. The society filed suit seeking to enjoin HHS from terminating federal funding of University of Miami programs.[120] This current decision, on remand from the Supreme Court, raised the question of the authority of HHS regulations measured against the program specificity of Title IX as held in the *North Haven* case.[121] The circuit court found that a prestigious all-male honorary society had a "pervasive discriminatory effect" on women in all of the institution's academic programs regardless of federal funding.[122] In reaching this ruling, the court relied on the "infection theory," that is, that discrimination was so pervasive that it infected programs receiving federal financial assistance and was a violation of Title IX. The issue of mootness was also raised by the defendant university since the institution had subsequently removed the organization's recognition and denied it use of university facilities as long as it maintained its single-sex membership requirements. While the circuit court rejected the mootness argument, the Supreme Court, on appeal, ruled the issue moot.[123]

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119. Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. 1983).
120. Iron Arrow Honor Soc'y v. Hufstedler, S.D. Fla. 1980); Iron Arrow Honor Soc'y v. Schweiker, 652 F.2d 445 (5th Cir. 1981), *vacated and remanded*, 102 S. Ct. 3475 (1982).
121. North Haven Bd. of Educ. v. Bell, 102 U.S. 1912 (1982).
122. Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 561 (5th Cir. 1983).
123. Iron Arrow Honor Soc'y v. Heckler, 52 U.S.L.W. 3384 (Nov. 15, 1983).

8.3d(3) Freedom of Press

Several freedom of press cases involved the funding methods used to publish student newspapers. In a Minnesota case the editors of the student newspaper at the University of Minnesota brought suit against the university as a result of a decision to change the funding method that supported the newspaper.[124] The editors alleged that the funding change was at least partially motivated by the administration's dissatisfaction with controversial content of a particular issue of the paper. As a result, the editors claimed a violation of first amendment freedom of press guarantees since revenues were reduced and editorial freedom was "chilled." The court ruled that failure by the university to take similar funding actions with regard to other university newspapers indicated that the action was at least partially motivated by the reasons alleged by the plaintiffs, resulting in a violation of the first amendment. A university may not take such actions as a result of disagreement with content of the publication.

In a North Carolina case involving a student challenge to partial funding of a student newspaper, the Fourth Circuit addressed first and fourteenth amendment questions dealing with freedoms of speech, association, and press, as well as equal protection.[125] Several students challenged a university requirement that called for payment of student fees to support the student newspaper, which plaintiffs alleged advocated views with which they disagreed. The court ruled that the minimal restriction of rights that accrued did not violate the fourteenth amendment. The newspaper served valuable functions, both in pursuit of communication within the university and the open exchange of ideas. Therefore, first amendment speech and associational rights were not abridged. The court also ruled that it could not force the newspaper to print, on an equal basis, opinions that disagreed with the paper's editorial opinions. This, they said, would violate the first amendment freedom of press guarantees.

8.3e Dismissal

8.3e(1) Disciplinary Dismissal

Several cases concerning student dismissals were heard by the courts this year.

In an Alabama case the Supreme Court of Alabama ruled that university officials followed proper due process procedures and did not

124. Stanley v. McGrath, 719 F.2d 279 (8th Cir. 1983).
125. Kania v. Fordham, 702 F.2d 475 (4th Cir. 1983).

act in bad faith in taking disciplinary action against a student who had made threats and harassing phone calls to a professor over a course grade.[126] According to the student, actions of school officials resulted in his being punished twice for the same offense. The court ruled that the university officials had acted in good faith and that there was no basis in material facts for the student's claim.

The Supreme Judicial Court of Massachusetts dealt with the question of arbitrary and capricious action on the part of college officials.[127] In this case the student was found guilty of interfering with the rights of other students by preventing them from entering a female student's room that the plaintiff and others had occupied illegally. One student was expelled by the college. After the expulsion decision by the dean of students, the student initiated an action for which a temporary restraining order preventing expulsion was given. In an appeal to the college president, the student agreed to withdraw his claim and waive the right to future action. The president upheld the dean's expulsion decision and the student again filed suit. The court ruled that the waiver of the right to action was valid and that the college acted within its contractual rights. As a result, summary judgment was granted to the institution. Further, the court acknowledged the institution's right to vary the punishment of individuals involved in an incident based on valid reasons such as the level of an individual's involvement.

In another Massachusetts case, a Boston University law student was expelled from the university as a result of several incidents in which he was caught peeping up the skirts of women students in the university library.[128] The First Circuit ruled that his due process rights had not been violated by use of the undergraduate due process procedures rather than the procedures used by the law school since the students bringing the charges were not law students. Nor had the plaintiff's contractual rights been violated by using the undergraduate process. Further, the availability of the transcript of the plaintiff's previous rape trial to the disciplinary committee did not violate his rights since the trial was a matter of public record.

In a final disciplinary dismissal case, the Florida District Court of Appeal ruled that a pharmacy student could be summarily dismissed from pharmacy school as a result of his conviction of possession of cocaine.[129] However, they noted that the student must be dismissed rather than expelled, but failed to explain the practical difference.

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126. Hartman v. Board of Trustees of Univ. of Ala., 436 So. 2d 837 (Ala. 1983).
127. Coveney v. President & Trustees of College of Holy Cross, 445 N.E.2d 136 (Mass. 1983).
128. Cloud v. Trustees of Boston Univ., 720 F.2d 721 (1st Cir. 1983).
129. Wallace v. Florida A & M Univ., 433 So. 2d 600 (Fla. Dist. Ct. App. 1983).

8.3e(2) Academic Dismissal

There were a number of issues before the courts this year concerning academic dismissals and academic decision-making with regard to the setting of grades and graduation requirements. These cases show the continued willingness of judges to grant deference to academicians in academic decision-making.

One particular case that shows the traditional position of judges with regard to academic decisions is a Georgia case in which the Supreme Court of that state found no justifiable controversy with regard to decisions on academic matters made by faculty members.[130] In this case a number of faculty refused to give a former student recommendations for a doctoral program. As a result, she charged a wide variety of contract, tort, and constitutional violations. The court refused to review the faculty member's academic decisions with regard to the quality of student work.

Several of the cases on this topic raise the issues of arbitrary and capricious action, or other impermissible behaviors, by the college or university as a basis for due process claims in academic dismissal. In one Pennsylvania case a medical student was dismissed for failure to adequately perform a pediatric clerkship.[131] Here the court ruled that the professor's decision was not arbitrary or capricious since there was clear evidence of inadequate performance by the student. It was also ruled that the student was given more than adequate due process procedures prior to his dismissal.

In another case involving a medical student the district court in Michigan ruled that the University of Michigan was protected from monetary damages by the eleventh amendment.[132] Here the student challenged his dismissal from the university and sought damages rather than reinstatement. In a related case the same plaintiff sought judicial compulsion to order the university to allow him to retake a part of a national medical examination.[133] The court refused to order this action and noted that the institution's decision was reached in an apparently fair and impartial manner and that as a result it did not violate substantive due process requirements. The court noted that the university had made a good faith evaluation of academic performance and that there was no apparent bad faith, ill will, or ulterior motive.

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130. Woodruff v. Georgia S. Univ., 304 S.E.2d 697 (Ga. 1983).
131. Stoller v. College of Medicine, 562 F. Supp. 403 (M.D. Pa. 1983).
132. Ewing v. Board of Regents of Univ. of Michigan, 552 F. Supp. 881 (E.D. Mich. 1982).
133. Ewing v. Board of Regents of the Univ. of Michigan, 559 F. Supp. 791 (E.D. Mich. 1983).

In another case a medical student attending a Wisconsin institution was dismissed because of a low grade point average and interpersonal conflicts with other medical students and faculty.[134] The student was notified, given a hearing, and had access to various appeals. The plaintiff charged violation of his due process rights along with discrimination based on religion, race, and sexual orientation. The district court found that the university had acted properly in its dismissal of the student, that the university's due process procedures were adequate, and that no facts supported an equal protection claim.

In a Virginia case a student was expelled for academic deficiencies.[135] In September of his third year the student was notified of incompletes on several courses taken in his second year of law school. Subsequent to the notification the student became embroiled in an honor code violation requiring him to defend himself. After three trials, guilty verdicts, appeals and remands, the charges were dropped. The student alleged that this activity interfered with his ability to make up the deficiencies. He also alleged violations of due process. Acknowledging some concern with the honor code judicial system at the University of Virginia, the court found the procedures would "withstand Constitutional condemnation upon facial attack."[136]

However, in a North Carolina case a student was successful in getting a preliminary injunction for readmission until the case could be decided on the merits.[137] The court found that a nursing student's allegation of due process violations in the award of a failing grade, based on a finding by the dean that she had cheated on an examination, raised questions to be adjudicated. When balancing the student's hardship with the institution's prerogatives, the court found hardship balanced toward the student, thus the injunctive relief. Evidence was sufficient to raise grave and serious questions about the university's actions.

Two other state cases failed to show bad faith or due process violations in academic dismissal.[138]

8.3f Federal Regulations

In a Texas case the district court decided questions related to student institutional contracts, section 504 of the Rehabilitation Act of 1973,[139]

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134. Sanders v. Ajir, 555 F. Supp. 240 (W.D. Wis. 1983).
135. Henson v. Honor Comm. of Univ. of Virginia, 719 F.2d 69 (4th Cir. 1983).
136. *Id.* at 75.
137. Jones v. Board of Governors of Univ. of North Carolina, 704 F.2d 713 (4th Cir. 1983).
138. State *ex rel.* Mercurio v. Board of Regents, 329 N.W.2d 87 (Neb. 1983); Wilson v. Illinois Benedictine College, 445 N.E.2d 901 (Ill. App. Ct. 1983).
139. 29 U.S.C. § 794 (1973).

and the fourteenth amendment. This case involved the university's shuttle bus program. A number of University of Texas students who were mobility impaired challenged the university's refusal to modify the shuttle buses to accommodate wheelchairs. The court ruled that although the students were "otherwise qualified handicapped individuals" under section 504, the program specific requirements of 504 excluded the university and its bus system from coverage by the act.[140] The bus system received no direct federal funds and handicapped students could not claim a right to ride shuttle buses or the right to live off campus. On their fourteenth amendment claim, the court ruled that because of the costs involved with modifications and the small number of students who would be benefited, the university had a legitimate governmental interest in not making the modifications. The court also ruled that the students had no claim of a property right under the fourteenth amendment, nor was the general information booklet published by the university part of its contract with students. The university was not obligated to provide shuttle service in return for payment of student fees.

8.3g NCAA Regulations

A football player challenged eligibility rules of the National Collegiate Athletic Association (NCAA) governing transfer from one four-year institution to another in successive years.[141] The plaintiff sued, alleging that rules regarding eligibility had been interpreted and applied in an arbitrary and capricious manner by the NCAA and attempted to apply the state monopolies law. A temporary injunction had been issued that allowed the plaintiff to play in four games on the freshman football team. The court ruled that the NCAA rules had been applied fairly and correctly, resulting in the plaintiff's ineligibility to participate in athletics for one year. State monopolies laws did not apply in this institution.

8.4 LIABILITY

Claims of institutional liability continue to reach the courts. These claims are organized under several headings. First, are personal injury claims. Second are claims under workers' compensation. Third are cases involving contract liability.

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140. Ferris v. University of Texas at Austin, 558 F. Supp. 536 (W.D. Tex. 1983).
141. English v. National Collegiate Athletic Ass'n, 439 So. 2d 1218 (La. Ct. App. 1983).

8.4a Personal Injury

A number of personal injury cases resulted from incidents, including a car accident during a student trip, a rape in a residence hall, placement of a hose across a sidewalk, and athletic injuries during university-sponsored activities. In the first case, the husband of a nursing student killed in an automobile accident while on a school field trip sued, based on negligence.[142] The deceased student nurse's liability release form, a waiver executed by all students taking the trip, was not admitted as evidence in the court. Named in the suit were the insurance companies of the institution, the student driver, and a trucking company involved in the crash, among others. The court of appeals upheld the trial court's award of damages to the plaintiff. The court stated that the waiver did not met the voluntary requirements of a waiver under Louisiana law, since it was a requirement of the field trip, which in turn was a requirement of the nursing program. Thus, the trial court was correct in not admitting the waiver as evidence. Further, the student driver was an agent of the institution, and the nursing students were not collectively involved in a joint venture. The evidence indicated negligence in the operation of the vehicle and institutional negligence in not providing a qualified driver.

In another case, where a student at a state institution was raped in her dormitory room, the plaintiff sought to recover damages based on the state's liability as a landlord.[143] The court found that in actuality the claim was based on suggested inadequate police protection by the state. The level of police protection claimed by the plaintiff was not necessary unless a special relationship existed between the plaintiff and the state, which she failed to establish.

A Texas Court of Appeals reversed and remanded a student's tort claims act suit dismissed by a lower court.[144] At issue on remand will be the question of placement of a water hose across a sidewalk without warning, which allegedly resulted in injury to the plaintiff and created an unsafe condition at the entrance to the library.

Several cases involved students participating in university athletic activities. In one case, a student participating in a floor hockey game, while attempting to tackle an opponent who had stolen the puck, received a fractured cervical spine.[145] The court found that his claim that the injury was due to lack of supervision and training by the referees was not supported by the facts. The referees' officiating, which was

142. Whittington v. Sowela Tech. Inst., 438 So. 2d 236 (La. Ct. App. 1983).
143. Miller v. New York, 466 N.Y.S.2d 436 (N.Y. App. Div. 1983).
144. Rawlings v. Angelo State Univ., 648 S.W.2d 430 (Tex. Civ. App. 1983).
145. Pape v. New York, 456 N.Y.S.2d 863 (N.Y. App. Div. 1983).

performed with reasonable care, did not contribute to plaintiff's injury, but rather his own actions in this case were the proximate cause of the injury.

A softball player, in another case, who slid into third base on a makeshift field was injured when her foot caught in a depression concealed by tall grass.[146] The court rejected the defendant institution's motion, invoking the doctrine of assumption of risk and contributory negligence. The plaintiff, at the moment of injury, was participating in a normal activity of softball and had no prior knowledge of the depression; therefore, the plaintiff's actions were not culpable conduct. Defendant was found to be negligent, affirming the lower court decision.

A third athletics case involved a case of student negligence.[147] A student athlete sprained his ankle and was treated by the student trainer with wraps and ice. The student may have spent one night with his foot immersed in a bucket of ice. The result was that the student lost several toes and muscle tissue in the foot. The foot may have to be amputated below the knee due to gangrene and osteomyelitis resulting from frostbite. The court found that the student athlete, not the institution, its trainer, or the team physician, was negligent in this case. The instructions to ice the sprain for short periods of time were clearly stated but not followed by the student.

8.4b Workers' Compensation

A suit against John Deere Company and Cornell University was brought for injuries sustained when a muffler on a tractor exploded while a student employee was working on the agriculture school's farm.[148] The court found that since the individual was viewed as an employee receiving workers' compensation, he could not pursue this remedy. The Workmen's Compensation Act is the exclusive remedy for employees.

8.4c Contract Liability

A North Carolina case involved the royalties on a process developed by two faculty members, which was being successfully marketed by a university foundation.[149] The faculty members, after developing sweet acidophilus milk, had allowed the university's dairy foundation to

146. Lamphear v. New York, 458 N.Y.S.2d 71 (N.Y. App. Div. 1983).
147. Gillespie v. Southern Utah State College, 669 P.2d 861 (Utah 1983).
148. Neish v. John Deere Co., 460 N.Y.S.2d 861 (1983).
149. Speck v. North Carolina Dairy Found., 307 S.E.2d 785 (N.C. Ct. App. 1983).

process and market the product. Plaintiffs never signed over legal title of the process to the foundation, but had agreed to allow the foundation to market the product. The plaintiffs worked closely with the foundation to produce and market the product. When it became clear that no provisions had been made for the plaintiffs to receive royalties from this very successful product and a request for royalties was denied, plaintiffs filed suit in district court asking for equitable distribution of the royalties. The district court issued a summary judgment in favor of the defendant university and its foundation, finding that no genuine issue of material fact existed and that the three-year statute of limitations under contrct law had lapsed.

The Court of Appeals of North Carolina reversed and remanded the case for trial. They noted that the district court had erred in using the statute of limitations under contract and fraud statutes. The court of appeals found the relationship between the plaintiff faculty and the institution and its foundation was one of fiduciary duty. A fiduciary duty existed where special confidence was placed in the university to act in good faith and with due regard to the interest of the one reposing the confidence. Plaintiffs did not sign over their rights to the process, but did acknowledge the legal title to defendants. Such acknowledgement does not establish waiver or abandonment on the part of the plaintiffs. On remand, the jury must decide whether plaintiffs entrusted defendants with a secret process with the expectation that defendants would protect plaintiffs' interests in a fair share of the royalties. If yes, then no waiver or abandonment occurred.

8.5 ANTITRUST

The question of the National Collegiate Athletic Association's (NCAA) right to control the telecast of collegiate football games under guidelines of the Sherman Antitrust Act[150] was again before the courts on appeal.[151] As reported last year, the district court found NCAA to be involved in price fixing, restricting output, and constituting a group boycott in violation of the Sherman Antitrust Act.[152] The Tenth Circuit Court affirmed that district court decision in part. They found that the NCAA contract with television networks for the purpose of the broadcast of college football restricted output and fixed prices in violation of

150. 15 U.S.C. §§ 1-2 (1980).

151. Board of Regents of Univ. of Oklahoma v. National Collegiate Athletic Ass'n, 707 F.2d 1147 (10th Cir. 1983), *cert. granted*, 104 S. Ct. 272 (1983).

152. *See* YEARBOOK 1983 at 320; Board of Regents of Univ. of Oklahoma v. National Collegiate Athletic Ass'n, 546 F. Supp. 1276 (W.D. Okla. 1982).

antitrust laws. The court applied the rule of reason analysis, noting probable review by the Supreme Court. They found that the control by NCAA unreasonably restricted competitive conditions because it resulted in increased concentration in the market place, prevented independent price, and prevented broadcasters from purchasing a product where no available substitute exists. However, the court reversed a portion of the lower court's ruling and held that the television plan and network contracts were not a group boycott under section 1 of the Sherman Antitrust Act, given the open bidding opportunities of all television networks. The Supreme Court has granted certiorari (*supra* note 151).